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No. 99-1178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE AND THE INSTITUTE FOR JUSTICE IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government, especially the idea that the U.S. Constitution establishes a government of delegated, enumerated, and thus limited powers. Toward that end, the Institute and the Center undertake a wide range of publications and programs: *e.g.*, Reynolds, *Kids, Guns and the Commerce Clause: Is the Court Ready for Constitutional Government?* Cato Policy Analysis No. 216, Oct. 10, 1994; R. Pilon, *Restoring Constitutional Government*, Cato's Letter No. 9, 1995; "The Court Rediscovers Federalism: Is It the Real Thing?" Policy Forum featuring Ronald D. Rotunda and Lyle Denniston, Sept. 17, 1999. The instant case raises squarely the question of the limits on Congress's power under the doctrine of enumerated powers and is thus of central interest to the Cato Institute and its Center for Constitutional Studies.

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici*, their members, or counsel contributed money or services to the preparation or submission of this brief.

The Institute for Justice is a nonprofit public interest legal center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is guaranteeing that Congress be limited to its enumerated powers under Article I, Section Eight of the United States Constitution.

FACTUAL SUMMARY

This case arises from the efforts of the Solid Waste Agency of Northern Cook County (the "Agency"), a public entity, to develop a site for "bale-fill" waste disposal. The Agency purchased 500 acres of land to establish a bale-fill after the Corps of Engineers told the Agency that the Corps claimed no jurisdiction over the land. Later, the Corps asserted jurisdiction over isolated waters dispersed among 17 acres.

The Agency obtained all necessary county and state approvals. However, the Corps of Engineers denied the Agency a permit. That denial rested upon the determination that certain migratory birds might at some time alight upon open pools of water, including "prairie potholes" as defined in 33 C.F.R. § 328.3(a)(3), known to form, from time to time, on the property.

These potholes can be as small as 1/10 of an acre in size (or less than the area of 1/10 of one football field – from the goal line to the 10-yard line), sometimes only two inches deep, seasonal (depending on the rainfall), and connect to no other

waterway. These potholes appear and disappear, and the exact same pothole may never reappear. The waters in those potholes are not navigable and not capable of becoming navigable by reasonable effort. There is no evidence in the record before the Court that any migratory birds actually ever used these waters. Pet. for Cert. at 6 n.3.

The Corps of Engineers therefore asserted that there was federal jurisdiction to bar use of the land for the Agency's purpose, based on the Clean Water Act, the Corps' regulations, and ultimately on the Commerce Clause of the Constitution.

The Agency now petitions the Court to rule that the Commerce Clause does not empower the Congress to regulate the use of land like the Agency's intended parcel, located entirely intrastate, with no existing connection to navigable waterways or likelihood of becoming so connected, solely on the basis of entirely speculative migratory bird landings, when the federal government has not met its burden to demonstrate any substantial relation to "commerce among the states."

ARGUMENT

I. THERE ARE LIMITS TO THE FEDERAL COMMERCE POWER.

In deciding cases of fundamental constitutional interpretation, the Court "starts with first principles," chief among which is the principle that the "Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). Federalism and the

enumeration of federal powers were principles "adopted by the Framers to ensure the protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Enumeration can serve that function, however, only as long as the powers enumerated are themselves understood as limited. Should one or a few prove to be effectively unlimited, enumeration becomes an empty promise.

This is a principle of longstanding, which James Madison emphasized in Federalist No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45 (quoted in *Lopez*, 514 U.S. at 552). Scholarly commentators agree with this principle. 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 3.3 at 346 (3d ed. 1999) ("It must never be forgotten that the federal government is one of enumerated powers and that it does not possess a general police power."); 1 Laurence H. Tribe, American Constitutional Law § 5-1 at 789 (3d ed. 2000) ("It is noteworthy that Article I, § 1 endows Congress not with 'all legislative power,' but only with the 'legislative powers herein granted.'").

That principle applies, of course, to the Commerce Clause, found in Article I, Section 8, giving Congress the power to regulate that portion of commerce – that is, trade – that takes place with foreign nations, among the several states, and with the Indian tribes. U.S. Const. art. I, §8. "[T]he enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the

power to every description." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (quoted in *United States v. Morrison*, 120 S. Ct. 1740, 1753 n.7 (2000)). As but one of the several powers delegated to Congress, it must be understood in that context. In particular, it cannot be understood in a way that would render those other powers superfluous. *Morrison*, 120 S. Ct. at 1754 n.8 ("the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."); *see also* 1 L. Tribe, *supra*, § 5-2 at 795-96 ("the Constitution, in granting congressional power, thus simultaneously limits it: *an act of Congress is invalid unless it is affirmatively authorized in the Constitution.*") (emphasis original) (citing to *Lopez*, 514 U.S. 549).

The scope of the commerce power must therefore be understood to have limits. All nine justices of the present Court have agreed on this much. *Lopez*, 514 U.S. at 556-57 (Rehnquist, C.J.) (even the most expansive of the Court's Commerce Clause precedents confirm "that this power is subject to outer limits."); *id.* at 580 (Kennedy, J., concurring) (Court has a "duty to recognize meaningful limits on the commerce power of Congress."); *id.* at 584 (Thomas, J., concurring) ("our cases are quite clear that there are real limits to federal power"); *id.* at 615-16 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) (recognizing the "distinction of what is national and what is local," and the inability of the federal government to regulate "marriage, divorce, and child custody," or any and all aspects of education).

A government that can regulate virtually anything and everything is not a limited government.

> Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. ... Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct.

Lopez, 514 U.S. at 588-89 (Thomas, J., concurring); *see also United States v. Morrison*, 120 S. Ct. 1740, 1759 (Thomas, J., concurring). The Court in *Morrison* held that Congress cannot regulate noneconomic activities (*e.g.*, sexual assault) simply because the activity, when aggregated, may have a substantial effect on commerce. If someone trips and falls, and thereby rips a hole in his trousers, that does not mean that Congress may regulate every slip and fall case in the United States simply because, if one adds them all together, they affect tailoring costs, and those costs affect commerce in the amount of threads and needles that cross state lines. May the federal government accordingly assert environmental jurisdiction over every pothole in the United States, simply because, after a rainfall, some birds might use the potholes for drinking?

If the federal power to regulate interstate commerce is to be limited to its stated ends, it cannot reach matters that are not commerce, or commerce that is not interstate. "The Constitution requires a distinction between what is truly national and what is truly local." *United States v. Morrison*, 120 S. Ct. at 1754; *see also Lopez*, 514 U.S. at 568; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937); *cf.* 1 Rotunda & Nowak, *supra*, § 4.9 at 459 ("Federal regulation of single state activities that are not commercial in character will not be upheld unless the federal government can demonstrate to the Court that there is a factual basis for the conclusion that the single state activities, as a class, have a substantial effect on interstate commerce."). "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons*, 22 U.S. (9 Wheat.) at 194-95.

II. THE ASSERTION OF JURISDICITION IN THIS CASE EXCEEDS THE LIMITS ON THE FEDERAL INTERSTATE COMMERCE POWER.

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice John Marshall set forth the Court's clear duty upon review of a federal statute challenged as exceeding Congress's authority.

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of

> executing its powers, pass laws for the accomplishment of objects not entrusted to the [federal] government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

17 U.S. at 423. Respondents justify the present statute as an act to regulate interstate commerce. But "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Morrison*, 120 S. Ct. at 1752; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 310 (1981) (Rehnquist, J., concurring). "[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring) (quoted in *Lopez*, 514 U.S. at 557 n.2). The Court of Appeals below wrongly assumed the Corps of Engineer's assertion to be true, rather than looking for factual support in the record and making the necessary judicial determination. 191 F.3d at 849.

Chief Justice Marshall definitively wrote in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90, 196 (1824), "Commerce ... is intercourse," and the "power to regulate" means "to prescribe the rule by which commerce is to be governed." In other words, commerce entails the deliberate and purposeful interaction of goods and people in trade, navigation,

communication and movement. *See Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 326 (1851) (Daniel, J., concurring) ("The power delegated to Congress by the Constitution relates properly to the terms on which commercial engagements may be prosecuted; the character of the articles which they may embrace; the permission or terms according to which they may be introduced"). Commerce is human activity, not the independent migrations of wild birds -- which are no more amenable to rules and governance in crossing State lines than are weather fronts and storms.

The power to regulate commerce also necessarily encompasses the attendant means of commerce, the instrumentalities, channels, or avenues in which it takes place. It is this second attendant category of commerce regulation that is the purported basis for the Corps of Engineers to assert jurisdiction over the Agency's land. Yet none of the parties contends that the Agency would engage in a deliberate movement of people or goods in commerce across state lines.

Without any relation to commerce among the states, there is no basis for federal jurisdiction to regulate the challenged activity. "[T]he express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *United States v. Dewitt*, 76 U.S. (9 Wall.) 41, 44 (1869). "No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers

clearly granted to the legislature." *License Tax Cases*, 72 U.S. (5 Wall.) 462, 470-71 (1866); *Gibbons*, 22 U.S. (9 Wheat.) at 194-95 ("It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States ....") (quoted in *Morrison*, 120 S. Ct. at 1753 n.7).

In distinguishing the truly national from the truly local, the Court is aware that "some activities may be so private or so local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce." *Hodel*, 452 U.S. at 310 (emphasis original). The lower court, acknowledging this distinction, agreed that the Agency should prevail if "the protection of migratory bird habitat is a matter of local concern only." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 191 F.3d 845, 851 (7th Cir. 1999).

The present case concerns the assertion of jurisdiction, under the Commerce Clause, by the Army Corps of Engineers, which historically has been charged with improving domestic, commercial navigation. Consistent with its role to develop and maintain the nation's inland waterways, the Corps of Engineers is granted jurisdiction over the "navigable waters of the United States." 33 U.S.C. § 1362(7); *cf. United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940) (cited in *Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975) ("The commerce clause vests power in Congress to regulate all waters navigable in interstate or foreign

commerce.")). But that jurisdiction cannot exceed the limits of the Commerce Clause, and accordingly it must be shown to concern actual and truly interstate commerce in order to pass constitutional scrutiny.

> Public navigable waters --
> constitute navigable waters of the United States within the meaning of the acts of Congress, *in contradistinction from the navigable waters of the States*, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries.

The Daniel Ball, 77 U.S. 557, 563 (1870) (emphasis added).

Otherwise, "there is undoubtedly an internal commerce which is subject to the control of the States." *Id.* The "waters" appearing on the Agency's land do not support transportation, nor do they connect with other waterways, actual or potential. These are in fact puddles and pools formed in recesses of land once strip-mined and now reclaimed to new use.

In *Lopez*, the Court drew a line barring congressional regulation of local intrastate activity that was not economic in itself. *See* 1 L. Tribe, *supra*, § 5-4 at 819 (Court focused "on the *nature of the underlying activity* – paying particular attention to whether or not that activity could itself be described as part of an economic enterprise") (emphasis original). It is difficult, if not impossible, to see how the occasional or speculated alightings of

migratory birds in seasonal pools and puddles on open land constitute "commerce." *Cf. Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371 (1978) (Blackmun, J.) (holding Privileges and Immunities Clause "not isolated from the Commerce Clause," and challenged disparity in hunting license fees for residents and nonresidents did not affect commerce where "Elk hunting ... is a recreation and a sport. ... It is not a means to the nonresident's livelihood. ... [and] The elk supply ... has been entrusted to the care of the State by the people of Montana.").

The Commerce Clause does not justify congressional use of "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968) (Harlan, J.); *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000) ("where a federal statute has only a tenuous connection to commerce and infringes on areas of traditional state concern, the courts should not hesitate to exercise their constitutional obligation to hold that the statute exceeds an enumerated federal power"); *cf. Independent Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (Sentelle, Cir. J.) (Potential crop loss due to insects insufficient basis to justify Comptroller of the Currency's assertion of federal power under national bank act).

Nothing about the subject Congress tried to regulate in this case was truly commerce, nor was it interstate. The isolation of the waters in question from any connection to waterways or channels capable or potentially capable of transport or travel

excludes them from the federal commerce power.[2] *See Adams*, 528 F.2d at 440 ("No purpose is served by application of a uniform body of federal law, on waters devoid of trade and commerce").

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[2] This is not to say that Congress might not act with regard to migratory birds on another constitutional basis. *See Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (Thomas, J., dissenting from denial of certiorari) ("I do not challenge Congress's power to preserve migratory birds and their habitat through legitimate means."). Congress has sufficient power, when there is an actual problem that the States could not themselves handle, or requires a uniform national solution (*e.g.*, over-hunting and the elimination of animals that do pass in interstate trade), to act when it has met its burden of proof. But that is not this case.

CONCLUSION

The decision of the Court of Appeals should be reversed. The Government has not met its burden of proof in this case.

Respectfully submitted,

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